No. 73-480

In the Supreme Court of the United States

OCTOBER TERM, 1973

CRISTOBAL CARDONA, ET AL., PETITIONERS

v.

ROBERT H. BORK,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On May 13, 1970, petitioners, representing themselves and other farm workers in Texas, intervened as plaintiffs in a class action brought by California farm workers in the United States District Court for the District of Columbia. The complaint sought declaratory and injunctive relief against the continued admission into the United States by the Immigration and Naturalization Service of alien "commuters"—*i.e.*, aliens previously authorized for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute daily or seasonally into this country to work. The complaint alleged that the practice of admitting aliens who once had valid immigrant visas but who now enter the country by use of their Alien Registration Receipt Cards violates applicable provisions of the Immigration and Nationality Act of 1952, 8 U.S.C.

1101, *et seq.* On December 21, 1971, the district court granted the government's motion for summary judgment (Pet. App. A).

On appeal, petitioners contended that alien commuters must have immigrant visas and a labor certification from the Secretary of Labor in order to enter the United States, that most commuters are properly non-immigrants who may not be admitted unless the Secretary of Labor determines that there is a labor shortage, and that commuters may not enter the country to take employment where a labor dispute exists, even if they have been previously employed there during a prior agricultural season. The court of appeals upheld the validity of the daily commuter procedure but ruled that the practice of admitting seasonal commuters as returning resident aliens was unlawful. The case was remanded to the district court for proceedings consistent with the court of appeals' opinion (Pet. App. B).

On August 14, 1973, the government filed a petition for a writ of certiorari (No. 73-300) to review that portion of the court of appeals' ruling which invalidated the practice of admitting seasonal commuters as returning resident aliens. Petitioners, who filed a brief in opposition to the government's petition, here seek review of the remaining portion of the court of appeals' ruling (upholding the practice of admitting alien daily commuters), but only in the event that the government's petition in No. 73-300 is granted (Pet. 9, 17).

The Court of Appeals for the Ninth Circuit, in *Gooch* v. *Clark*, 433 F. 2d 74, certiorari denied, 402 U.S. 995, has upheld both the daily and the seasonal commuter programs. The decision of the court below in the present case thus conflicts with that of the Ninth Circuit only on the issue presented in our petition:

whether the seasonal commuters may properly be treated as duly admitted immigrants returning from temporary visits abroad. The two courts are in agreement that daily commuters may be so treated.

We think both courts decided the daily commuter issue correctly. We agree with petitioners, however, that the legal issues respecting both classes of commuters are identical in many respects. Indeed, prior to the decision below in this case, it had been assumed by all that the daily and seasonal programs were legally indistinguishable (see Pet. App. 23).

We therefore suggest that it would be appropriate for the Court to grant the petition in this case if it grants the government's petition in No. 73-300. In that way, it could resolve the legal status of both classes of commuters in a single proceeding.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.